HASIBULLAH BIN MOHD. GHAZALI

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
TAN SRI DATUK GUNN CHIT
TUAN CJ (MALAYA),
TAN SRI DATO' HAJI MOHD. AZMI BIN
DATO' HAJI KAMARUDDIN SCJ,
TAN SRI DATUK EDGAR JOSEPH JR. SCJ
[CRIMINAL APPEAL NO. 05-96-91]
14 SEPTEMBER 1993

EVIDENCE: Alleged confession statement made to police officer - Whether appellant in fact made confession - Whether prosecution had proven that confession was made and that it was voluntarily made - Standard of proof - State of mind of appellant when alleged confession was obtained - Whether the circumstances under which the confession was obtained were oppresive - Whether confession properly admitted in evidence - Whether admission was gravely prejudicial to appellant - Whether there was a miscarriage of justice.

CRIMINAL LAW & PROCEDURE: Charge of possession of dangerous drugs - Failure to consider evidence in favour of appellant - Whether failure to do so was a misdirection by way of non-direction.

The appellant together with two others were charged with trafficking in dangerous drugs contrary to s. 39B(1)(a) of the Dangerous Drugs Act 1952. The appellant and the others were arrested as a result of a raid on a house in which the accused were the occupants. The drugs were recovered from a room in the house. According to the prosecution witnesses the appellant acknowledged, in reply to questions posed by the officer in charge of the raiding party (Giam), that the room and all the items found in the room were his.

At the trial the prosecution attempted to put into evidence the statements allegedly made by the appellant. The appellant mounted a challange to the admissibility of the alleged incriminating replies on the grounds that:

(1) no caution in the statutorily prescribed form, or at all, had been administered;
(2) apart from the replies made by the three accused persons to questions to establish their identities, no conversation of any sort had taken place between the police officer and the three accused persons or any of them; and
(3) even if any incriminating replies had been made by the appellant, they were not proved to have been voluntarily made.

The trial Judge held a trial within a trial to consider the admissibility of the impugned evidence at the conclusion of which he admitted the same. In the event the appellant was convicted and sentenced to death while the other two accused were acquitted and discharged. The appellant appealed against his conviction.

Held:

[1] Even if an accused person repudiates a confession, and the Court finds that he did make the replies, it is still necessary for the Court to be satisfied that the replies were voluntarily made because tha onus on the prosecution of proving voluntariness does not shift merely because of the stance adopted by the defence.

[2] As it was the appellant who fetched the key to the room from which the drugs were recovered, it was natural for him to be a target for Giam's attention. It would also be natural for Giam, as the investigating officer in the case, to ensure that his efforts did not go down the drain. In the circumstances Giam's testimony as to the alleged confession made by the appellant could not be accepted at its full face value but had to be scrutinised with great care and tested against the rest of the evidence and the probabilities of the case.

[3] Although the appellant was the one who handed the key to the room to Giam, he did not take it out of his pocket, but lifted it from the nail in the wall of the master bedroom, to which all the three accused might have had access. It would therefore be wrong to infer from the fact that because the appellant had handed the key to the room, he must have been in possession or control of the offending exhibits found there since other inferences in his favour could also have been drawn.

[4] Although the learned Judge had painstakingly recounted the testimony given before him during the trial within a trial, nowhere in his judgment did he mention the significance of that evidence. The learned Judge's failure to do so was a misdirection by way of non-direction and as such the learned Judge was wrong in holding that the prosecution had proved beyond reasonable doubt that the appellant did make the alleged confession attributed to him.

[5] Even assuming that the appellant had made the alleged confession, the learned trial

Judge was wrong in holding that the confession had been made voluntarily in that by holding that the accused must show that he was put in fear in order that the statement should result, the learned Judge had reversed the onus of proof and disregarded the requirement that the prosecution must prove beyond any reasonable doubt that the confession was voluntary.

[6] In deciding whether or not a statement made by an accused person was obtained from him either by fear or prejudice or hope of advantage exercised or held out by a person in authority, the cardinal point is the state of mind of the accused. The learned Judge in holding that the appellant was not in the sort of fear the law requires to exclude his statement, had excluded from his consideration the state of mind of the appellant with all its foibles and fortitudes and had instead confined his attention to the intention of Giam.

[7] The learned Judge in holding that the refusal of the appellant to sign the paper upon which Giam had recorded the replies allegedly made by the appellant told against him, had failed to consider that the appellant's refusal was equally open to the inference that the alleged incriminating replies might have been the result of inducement or threat, given that at the time when the replies were allegedly given the appellant must have been in a distraught state and under severe anxiety and mental strain. Where a proved or admitted fact is equally open to two inferences, that in favour of the accused should be adopted and the Judge's directions to himself on this point were fatally flawed.

[8] Further, the learned Judge ought to have excluded the alleged confession having regard to the oppresive circumstances under which it was made. The Judge failed to recognise that psychological oppression can be more insidious than, and just as effective, as physical pressure on a suspect who in many cases will be incapable of evaluating its effect upon him and not sufficiently articulate to explain the circumstances and effect to the Court. The Judge should therefore have concentrated on the methods adopted by Giam in questioning the appellant and the conditions under which that questioning was conducted rather than on whether the appellant was "put in fear in order that a statement would result".

[9] The improper admission of the alleged confession was gravely prejudicial to the appellant and turned the scales against him and, in consequence, a miscarriage of justice might well have occured. Without the evidence of the alleged confession, the case against the appellant was based upon suspicion and guesswork and got nowhere near to establishing the essential ingredients of the offence of which he was convicted, bearing in mind that the proverbial cap fitted not just the head of the appellant but of the other accused persons as well, who were also sleeping in the house at the time of the police raid.

[Appeal allowed. Conviction quashed. Sentence set aside. Acquittal and discharge ordered].

[Bahasa Malaysia Translation of Headnote]

KETERANGAN: Pengataan bahawa pernyataan pengakuan dibuat kepada pegawai polis - Sama ada Perayu sebenarnya membuat pengakuan - Sama ada pendakwaan membuktikan bahawa pengakuan telah dibuat dan bahawa ia dibuat secara sukarela - Standard kebuktikan - Keadaan minda Perayu ketika pengakuan yang dikatakan itu diperolehi - Sama ada keadaan di bawah mana pengakuan diperolehi adalah bersifat penindasan - Sama ada pengakuan diterima dengan wajar dalam keterangan - Sama ada pengakuan bersifat prejudis kepada Perayu - Sama ada terdapat salah laksana keadilan.

UNDANG-UNDANG JENAYAH & PROSEDUR: Pertuduhan memiliki dadah berbahaya - Kegagalan untuk menimbangkan keterangan bagi manfaat Perayu - Sama ada kegagalan untuk berbuat sedemikian merupakan suatu salah arah melalui ketidakarahan.

Perayu bersama-sama dengan dua orang yang lain telah dipertuduhkan mengedar dadah berbahaya bertentangan kepada s. 39B(1)(a) Akta Dadah Berbahaya. Perayu dan yang lain telah ditangkap akibat daripada suatu serbuan ke atas sebuah rumah di mana tertuduh merupakan penghuninya. Dadah tersebut dijumpai di sebuah bilik dalam rumah tersebut. Menurut saksi-saksi pendakwa Perayu mengakui, sebagai menjawab soalan yang dikemukakan oleh pegawai yang mengetuai serbuan tersebut (Giam), bahawa bilik dan segala barang yang dijumpai dalam bilik tersebut adalah kepunyaannya.

Diperbicaraan pihak pendakwa telah berusaha untuk memasukkan dalam keterangan

pernyataan-pernyataan yang dikatakan dibuat oleh Perayu. Perayu telah mencabar kebolehterimaan dakwaan jawapan yang menunjukkan ia bersalah atas alasan bahawa:

(1) tiada amaran dalam borang statutori yang ditetapkan, atau sama sekali, dilaksanakan;
(2) selain daripada jawapan-jawapan yang dibuat oleh tiga orang yang dituduh tersebut kepada soalan-soalan untuk mengenalkan diri masing-masing, tiada apa jua konumikasi dibuat diantara pegawai polis dan ketiga-tiga tertuduh tersebut atau mana-mana dari mereka; dan
(3) jika ada sebarang jawapan yang menunjukkan ia bersalah dibuat oleh Perayu, jawapan-jawapan tersebut tidak dobuktikan dibuat secara sukarela.

Hakim perbicaraan telah mengadakan perbicaraan dalam perbicaraan bagi menimbangkan kebolehterimaan keterangan yang dipersoalkan di penghujung mana beliau menerimanya. Akhirnya Perayu telah disabitkan kesalahan dan dijatuhkan hukuman mati sementara dua orang yang lain itu telah dibebaskan dan dilepaskan. Perayu membuat rayuan terhadap kesabitan kesalahannya.

Diputuskan:

[1] Jika sekalipun seseorang tertuduh menolak pengakuan, dan Mahkamah mendapati bahawa tertuduh tersebut ada membuat jawapan-jawapan berkenaan, adalah perlu untuk Mahkamah berpuashati bahawa jawapan-jawapan tersebut dibuat secara sukarela kerana beban ke atas pihak pendakwa untuk menbuktikan sukarela tersebut tidak berpindah hanya kerana kedudukan yang diambil oleh pihak pembela.

[2] Memandangkan Perayu yang membawa kunci kepada bilik dari mana dadah berkenaan dijumpai, adalah biasa yang dia menjadi sasaran tumpuan Giam. Juga merupakan perkara biasa bagi Giam, selaku pegawai penyiasat dalam kes ini, untuk menentukan usaha-usahanya tidak menjadi sia-sia sahaja. Dalam hal ini testimoni Giam berhubung dengan pengakuan yang didakwa dibuat oleh Perayu tidak boleh diterima berdasarkan kepada nilai luarannya tetapi perlu diteliti dengan penuh cermat dan diuji dengan keterangan-keterangan yang selebihnya dan kebarangkalian kes tersebut.

[3] Walaupun Perayu yang menyerahkan kunci bilik berkenaan kepada Giam, dia tidak mengeluarkan kunci itu dari dalam poketnya, tetapi dari tempat gantungan di dinding bilik tidur utama, kepada mana kesemua ketiga-tiga tertuduh mempunyai akses. Oleh itu adalah salah untuk menyimpulkan bahawa memandangkan Perayu yang menyerahkan kunci itu, tentulah dia yang memiliki atau mengawal ekshibit yang menyalahi undang-undang yang ditemui di dalam bilik berkenaan memandangkan lain-lain kesimpulan yang memihak kepadanya juga dapat dibuat.

[4] Walaupun Hakim yang bijaksana tersebut telah bersusah-payah menghitung testimoni yang diberikan di hadapan beliau sepanjang perbicaraan dalam perbicaraan, beliau tidak menyebutkan dalam mana-mana bahagian dalam penghakimannya mengenai kepentingan keterangan tersebut. Kegagalan Hakim yang bijaksana untuk berbuat sedemikian merupakan suatu salah arah melalui ketidakarahan dan oleh yang demikian Hakim yang bijaksana tersebut tersilap apabila memtutuskan bahawa pihak pendakwa telah membuktikan di luar keraguan yang munasabah yang Perayu ada membuat pengakuan yang didakwa diberikan olehnya.

[5] Sekalipun diandaikan yang Perayu telah membuat pengakuan yang didakwa itu, Hakim perbicaraan yang bijaksana tersebut telah tersilap apabila memutuskan bahawa pengakuan tersebut dibuat secara sukarela di mana dalam memutuskan yang tertuduh mestilah menunjukkan yang dia diletakkan di bawah ketakutan untuk membolehkan pernyataan tersebut berhasil, Hakim yang bijaksana tersebut telah menterbalikkan beban membukti dan tidak mempedulikan keperluan bahawa pihak pendakwa perlu membuktikan di luat keraguan yang munasabah bahawa pengakuan tersebut adalah dibuat secara sukarela.

[6] Dalam memutuskan sama ada atau tidak sesuatu pernyataan yang dibuat oleh seseorang tertuduh diperolehi daripadanya sama ada secara ketakutan atau prejudis atau harapan kelebihan diamalkan atau diberikan oleh seseorang yang berkuasa, yang penting sekali ialah keadaan minda tertuduh. Hakim yang bijaksana tersebut dalam memutuskan bahawa Perayu tidak berada dalam ketakutan yang sepertinya yang dikecualikan oleh

undang-undang daripada menerima pernyataannya, telah mengecualikan daripada pertimbangan beliau akan keadaan minda Perayu dari segala kelemahan dan ketabahan dan sebaliknya menghadkan tumpuan beliau kepada niat Giam.

[7] Hakim yang bijaksana tersebut dalam memutuskan bahawa keengganan Perayu untuk menandatangani kertas atas mana Giam telah merekodkan jawapan-jawapan yang didakwa dibuat oleh Perayu beritahu terhadapnya, telah gagal untuk menimbangkan bahawa keengganan Perayu adalah terbuka kepada kesimpulan bahawa jawapan-jawapan yang menunjukkan ia bersalah yang didakwa itu mungkin disebabkan oleh dorongan atau ugutan, dengan mengambilkira bahawa pada waktu di mana jawapan-jawapan tersebut didakwa sebagai diberikan, Perayu mungkin berada dalam keadaan fikiran yang terganggu dan kebimbangan yang serius serta tekanan mental. Di mana sesuatu fakta yang terbukti atau diakui terbuka kepada dua kesimpulan, bahawa ia perlu diterima bagi manfaat tertuduh dan arahan Hakim akan dirinya atas poin ini telah tersilap dan membawa padah.

[8] Selanjutnya, Hakim yang bijaksana tersebut sepatutnya mengecualikan pengakuan yang didakwa itu dengan mengambilkira keadaan bersifat penindasan di bawah mana ia dibuat. Hakim tersebut gagal untuk mengiktiraf bahawa penindasan berbentuk psikologi boleh menjadi lebih berbahaya berbanding dengan, dan juga berkesan seperti, tekanan fisikal ke atas seseorang yang disyaki yang mana dalam kebanyakan kes tidak akan berupaya menilai kesannya ke atas diri mereka dan tidak cukup jelas untuk menerangkan keadaan dan kesannya kepada Mahkamah. Oleh yang demikian Hakim tersebut sepatutnya menumpukan ke atas cara-cara yang digunakan oleh Giam dalam menyoal Perayu dan keadaan di bawah mana persoalan tersebut dijalankan berbanding sebaliknya sama ada Perayu "diletakkan di bawah ketakutan untuk membolehkan sesuatu pernyataan berhasil".

[9] Penerimaan yang tidak wajar akan pengakuan yang didakwa itu adalah bersifat prejudis kepada Perayu dan memerangkapnya, dan akibatnya, suatu salah laksana keadilan mungkin jelas telah berlaku. Tanpa keterangan pengakuan yang didakwa itu, kes terhadap Perayu adalah berdasarkan kepada syak-wasangka dan teka-meneka dan tidak sampai kepada pembuktian kandungan yang penting mengenai kesalahan di mana dia disabitkan, dengan mengambil ingatan bahawa peribahasa tersebut bukan sahaja padan dengan Perayu tetapi juga lain-lain orang tertuduh, yang mana pada ketika itu sedang tidur dalam rumah tersebut apabila serbuan polis dibuat.

[Rayuan dibenarkan. Kesabitan kesalahan dibatalkan. Hukuman diketepikan. Pembebasan dan pelepasan diperintahkan].

Cases referred to:
PP v. Lai Pong Yuen & Ors. [1968] 1 MLJ 12, 14 ***(refd)***
R v. Thompson [1893] 2 QB 12 ***(refd)***
Sarwan Singh v. State of Punjab AIR [1957] SC 637, 643 ***(refd)***
PP v. Thum Soo Chye [1954] MLJ 96, 99 ***(refd)***
Ibrahim v. the Emperor [1914] 599 AC ***(foll)***
Wong Kam Ming v. the Queen [1980] AC 247 ***(foll)***
R v. Richards [1967] 51 Cr. App. Rep. 266 ***(refd)***
R v. Northam [1968] 52 Cr. App. Rep 97 ***(refd)***
Mokhtar bin Hashim v. PP [1983] 2 CLJ 10 / [1983] 2 MLJ 232 ***(foll)***
R v. Priestley [1965] 51 Cr. App. Rep 1 ***(refd)***
R v. Prager [1972] 1 WLR 260 ***(refd)***
R v. Fulling [1987] 2 AER 65 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 399(iv)
Dangerous Drugs Act 1952, ss. 2, 37A, (1), (da), 39B(1)(a), 39B(2)
Evidence Act 1950, ss. 24, 32(b)

For the appellant - Karpal Singh; M/s. Karpal Singh & Co.
For the respondent - Ng Aik Guan, DPP

JUDGMENT

Edgar Joseph Jr. SCJ:
The appellant, together with Johar bin Johan and Rahmat bin Sukairman, were jointly prosecuted in the High Court at Shah Alam upon the following charge:

> That you, on 30 December 1988 at about 5.00 a.m., at house No. 254, Jalan Jasa 25, Taman Jasa, Batu Caves, Selayang, in the District of Gombak, in the State of Selangor Darul Ehsan, were found in possession of a dangerous drug, that is, "cannabis", to wit, 31.19432 kg., and that you have accordingly committed an offence under s. 39B(1)(a) of the Dangerous Drugs Act No. 30/52 punishable under s. 39B(2) of the same Act.

In the event, the appellant was convicted and sentenced to death but the two other accused persons were **both** acquitted and discharged. Against that conviction he had appealed.

According to the evidence led by the prosecution, acting on information received, a team of ten detectives, led by Inspector Giam Kar Hoon ("Giam") raided a dwelling house known as 254, Jalan Jasa, Taman Jasa, Batu Caves, Kuala Lumpur ("the house"), on 30 December 1988 at about 5.00 a.m.

On arrival at the house, they found that the front grill door was not locked though the front wooden door was.

Inspector Giam knocked on the door and, at the same time, shouted, identifying himself, but no one opened the door, so one of his men - Detective Corporal Gulam ("Gulam") - kicked open the door.

On entering the house, the police party found that it was in complete darkness, and lying on the floor in the hall, on mattresses still asleep, were the accused persons Johar and Rahmat. Giam noticed that the light in the master bedroom was switched on. Gulam then switched on the hall lights. The appellant then opened the front bedroom door and took a look. As he did so, Constable Zainal held the appellant and pulled him out. Giam walked into the room and found that no one was in it. He then came out and, on his instructions, the appellant was promptly handcuffed to the accused Johar while the accused Rahmat was handcuffed separately.

It was at this point of time that Giam told the three accused persons that the house had been raided on suspicion that it was being used for trafficking in ganja.

Whilst Constable Vijayan ("Vijayan") stood guard over the three accused persons, Giam administered the statutory caution under s. 37A of the Dangerous Drugs Act in Bahasa Malaysia, to them. Each confirmed that he understood the statutory caution. Giam then obtained the personal particulars of the three accused persons. As he took down those particulars, Gulam called out saying the door to the second bedroom (bilik dua) was locked. Giam queried the three accused persons as to who slept in that bedroom but they made no reply.

So, Giam knocked on the door of the second bedroom, at the same time asking whoever was inside to open the door, yet there was no reply. Giam then attempted to make a forcible entry by kicking the door open. Having failed with his first kick, he was preparing to give it a second kick when, he heard someone shout out - it might be thought, somewhat obligingly - "saya punya" ("it is mine"). Giam queried Vijayan as to who this was and Vijayan replied it was Hasi, that is to say, the appellant. Giam then asked the appellant for the key and the appellant went into the master bedroom, dragging Johan with him, took down what was described by the Judge as a "bunch of two keys" from a nail on the inside of the door to the master bedroom, which he handed to Giam who then used it to open the door to the second bedroom.

Giam then entered the second bedroom and the three accused persons were taken into that room. It was dark, so Giam switched on the lights. He saw that next to the wall was a large travelling bag bearing the brand name "Elegeant", being Ex P24, with its zip open. On examining the bag, he found that it contained 15 slabs of compressed leaf material neatly wrapped in plastic with adhesive tape - 4 of these slabs being wrapped in Thai newspaper. He also noticed, that next to the bag, was a large cardboard box. On examining this, he found in it a smaller cardborad box bearing the brand "Tea Kettle", which in turn contained a weighing machine, 3 rolls of tape and rubber bands, blades and pieces of brown papers of uniform size which matched the brown paper found in the third bedroom. Within close proximity of the large cardboard box, Giam also noticed, an open blue plastic bag containing dried leaf material and, next to this, was a black plastic bag containing dried twigs. He suspected that the leaves and twigs were ganja.

Addressing the three accused persons, Giam asked them to whom all this belonged, and the appellant, it was said - and, again, we feel compelled to interpolate - somewhat obligingly replied: "semua barang dalam bilik ini adalah saya punya" ("all the things in this bedroom are mine"). This was a crucial piece of evidence (relied upon by the Judge), since, if true, and provided the plant material was proved to be cannabis within the meaning of s. 2 of the Act and of sufficient weight, having regard to s. 37(da) of the Act, it could, in principle, be sufficient by itself to support the conviction though the rule of prudence requires corroboration. (Per Ismail Khan J. (as he then was) in *PP v. Lai Pong Yuen & Ors.* [1968] 1 MLJ 12, 14). We shall be returning to this point later on in this judgment.

Giam continued his search and in the third bedroom, he found sheets of brown paper scattered on the floor. While on a table in the dining room he found part of a Tamil newspaper on which lay some dry leafy material, suspected to be cannabis and a bunch of two keys, - one fitting the front grill door and the other a Toyota car parked under the porch. In the front room, he found nothing incriminating.

Giam then searched the Toyota car, but apparently found nothing incriminating. When queried by Giam as to whose car it was, the appellant replied: "Saya punya kereta. Saya beli dari kawan saya sudah bayar lapan ribu ringgit".

All the three accused persons were present at all stages of the search and at the conclusion thereof, were brought back into the house. While Vijayan left for the police station, Selayang, to fetch the police photographer, Giam picked up a piece of paper from the dining table and wrote on it what was allegedly said by the appellant, at the time he was about to kick the door of the second bedroom, the second time, and when the appellant was asked, to whom the articles in the second bedroom belonged. In the presence and hearing of Johar and Rahmat, Inspector Giam then read over what he had written on the paper (Ex P21) to the appellant, who was requested to sign it. The appellant then asked Giam if it would be used in Court to which question Giam replied, it may or may not. The appellant then refused to sign it.

The police photographer then arrived and took photographs of the various exhibits *in situ* as well as further photographs of these when the contents were taken out. After that, Giam prepared a search list and recorded therein a description of the various exhibits recovered and from where they were recovered. Having explained to the three accused persons the contents of the search list, they were requested to sign it and they all did so. That search list was produced in Court and marked P20. The Judge drew attention to the fact that item 4 in the search list specifically referred to "the bunch of two keys" one of which had been used to open the second bedroom and that it was recovered by the appellant from the master bedroom and handed to Giam.

It would be convenient if, at this stage, we referred to the challenge mounted by the defence to the admissibility of the alleged incriminating replies made by the appellant to the questions put by Giam hereinbefore mentioned. That challenge was based on three separate grounds; to wit:

(1) that no caution in the statutorily prescribed form, as alleged by Giam, or at all, had been administered to the appellant,

(2) that apart from the replies made by the three accused persons to questions to establish their identites, no conversation of any sort had taken place between Giam and the three accused persons or any of them, and

(3) that in any event, if any incriminating replies had been made by the appellant, to the questions put by Giam, they were not proved to have been voluntarily made.

That challenge by the defence to the admissibility of the impugned evidence led to the Judge holding of a trial within a trial at the conclusion of which the Judge admitted the same.

Clearly, the challenge mounted by the appellant was threefold; apart from taking the caution point, he was **repudiating,** the replies attributed to him. He was also contending, by way of alternative, that if the Court found that he did make those replies, then they were not voluntarily made. In other words, he was **retracting** those replies.

We had considered the question of law, whether if an accused person repudiates a confession, and the Court finds that he did make the replies, is it still necessary for the Court to be satisfied that the replies were voluntarily made. In our view, it is still necessary, because the onus on the prosecution of proving voluntariness remains with the prosecution, and does not shift merely because of the stance adopted by the defence.

As for the grounds for his holding that Giam must have administered the statutory caution under the Act to the three accused persons, and that pursuant thereto, Giam must have questioned them, and that as a result, the appellant must have made the alleged confession to Giam by way of replies to those questions, the Judge said this:

> There was no dispute that a very large quantity of cannabis had been recovered from bilik dua, and a smaller quantity from the dining room table. It was also not in dispute that Giam was the only person in the police team who was of the rank of Inspector. Everybody else was below that rank. Consequently, only a

statement made to Giam or in his hearing was admissible in evidence provided the necessary statutory pre-conditions were satisfied under s. 37A of the Act.

Giam and Vijayan gave evidence on this aspect of the trial. They were both unshaken in cross-examination. Hasi, Johar and Rahmat all gave evidence. They contradicted Giam on all material points of his testimony.

I had no hesitation in rejecting their evidence because it was inherently incredible that being the leader of the police party and the only person of Inspector's rank, Giam would not have done everything he reasonably could to flush out the drugs in the house and the person or persons linked with it. I hold that Giam must have questioned the three Accused and bearing in mind his familiarity with the statutory requirements he must have given the caution which he knew by heart.

That he (the Appellant) did make the statement is proven by the fact that there was no reason whatsoever for Inspector Giam to fabricate a case against Hasi (the Appellant) alone.

The Judge failed to recognise that because Giam would not have failed to do everything he reasonably could to flush out the drugs and the persons he **thought** might be linked to them, Giam might have considered it his duty to obtain a confession from the appellant. And why did Inspector Giam pick on the appellant? The Judge thought that this was a point which told strongly in favour of Giam. Lest we forget, it was the appellant who fetched the key to the second bedroom (from where the drugs were recovered) and handed it to Giam. The appellant was thus a natural target for Giam's attention. It would also be natural for Giam, as the investigating officer in the case, to ensure that his efforts did not go down the drain. That being so, Giam's testimony as to the alleged confession made by the appellant could not be accepted at its full face value but had to be scrutinised with great care and tested against the rest of the evidence and the probabilities of the case.

So far as the appellant's plea of repudiation of the alleged replies to Giam attributed to him, was concerned, we did not consider, that the Judge should have looked at it askance, as he undoubtedly did.

To recapitulate, according to Giam, upon being informed by Gulam, that the door to the second bedroom was locked, he asked the three accused persons, who slept in it, but they all remained silent. Giam then knocked on the door but received no response. He then attempted to force the door open by kicking it, but failed. Next, he was about to kick it again, when the appellant allegedly replied "saya punya" ("it is mine").

A little later, with the help of a key which the appellant obtained from the master bedroom (it was hanging on a nail in the wall), Giam gained entry into the second bedroom and there recovered *inter alia*, the offending exhibits. Giam then asked all the three accused persons to whom the offending exhibits belonged, and luck seems to have been on the side of the prosecution because it was alleged that, at that point of time, the appellant obligingly replied: "semua barang dalam bilik ini pun adalah saya punya". (All the things in this room are mine).

It is relevant to consider what the situation was at that stage of the police raid. At the time the police had arrived, the three accused persons were found in the house in the circumstances outlined above. The tenant of the premises was not the appellant but the accused Johar, and as such, in law, it would be he who had exclusive possession of the house, and therefore, the right of access to the second bedroom. True it is that Giam gained access to the second bedroom, with the help of the appellant, who handed him the key, and this appears to have left the Judge with the impression that the appellant had a much more difficult case to meet than the other accused persons.

However, the appellant did not take the key out of his pocket, but lifted it from the nail in the wall of the master bedroom, to which all the three accused might have had access. It would therefore be wrong to infer from the fact that because the appellant had handed the key to the second bedroom, he must have been in possession or control of the offending exhibits found there since other inferences in his favour could also be drawn.

We are thus reminded of what was said in *R v. Thompson* [1893] 2 QB 12, a case decided in the Court of Crown Cases Reserved, where the Court was comprised of Coleridge CJ, Hawkins J., Wills J., Day J. and Cave J. - all judges with very extensive experience in the administration of criminal justice. Delivering the judgment of the Court, Cave J. said this (at p. 18):

I would add that for my part I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, and

> which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but, when it is not clear and satisfactory, the prisoner is not infrequently alleged to have been seized with the desire born of penitence and remorse to supplement it with a confession; - a desire which vanishes as soon as he appears in a court of justice.

It is true that the Judge painstakingly recounted the testimony given before him during the trial within a trial to determine the admissibility of the appellant's replies and then found, as a fact, that following the prescribed caution, the replies attributed to the appellant were made by him, voluntarily and that they were true. But, nowhere in his judgment did he even mention the significance of that evidence; namely, the matters to which we have just referred regarding this part of the case, which had troubled us not a little and made us suspicious of the prosecution's version as to the alleged replies by the appellant which, to put it mildly, seemed to us, too good to be true. We considered that the Judge's failure to do so was a misdirection by way of non-direction. We were therefore of the view that the Judge was wrong in holding that the prosecution had proved beyond reasonable doubt that the appellant did make the alleged confession attributed to him.

That would have been sufficient to have disposed of the confession point in favour of the appellant but we went further and considered the question whether, assuming that the appellant had made the alleged confession, as Giam insisted he had, the prosecution had proved it to have been made voluntarily.

Now, an appellate Court is entitled to interfere with a finding of fact relating to the voluntariness of a confession if that finding has been arrived at without applying the true and relevant legal tests and consideration of relevant matters. (*Sarwan Singh v. State of Punjab* AIR [1957] SC 637, 643; *PP v. Thum Soo Chye* [1954] MLJ 96, 99).

The Judge decided this question in favour of the prosecution and his reasons for doing so appear in the following passages in his grounds of judgment:

> Admittedly the forced entry into the house at dawn, the rude awakening by the police, the handcuffing of the accused, and their probable knowledge of the presence of cannabis in the house must have brought about an instant realisation that they were in peril of their lives. However it is my view that fear produced by a surprise ambush is not enough to make a statement involuntary. **However frightened the target of a police raid may be from extraneous causes, to exclude a caution statement on the ground that he was put in fear, he must show that he was put in that fear in order that the statement should result.**
>
> **That Hasi was not in the sort of fear the law requires to exclude his statement is proved by the fact that he was bold enough to refuse to sign it. That he did make the statement is proven by the fact that there was no reason whatsoever for Inspector Giam to fabricate a case against Hasi alone.**
>
> Consequently I had no hesitation in ruling that Hasi's statement to Giam be admitted in evidence.
>
> (Emphasis supplied).

In our view, these directions by the Judge to himself, on the issue of admissibility, were fatally flawed on no less than three separate grounds:

First, it is a fundamental principle of our Criminal Law that in deciding the issue of admissibility of a confession made by an accused person, the onus is not on the accused to show involuntariness but on the prosecution to prove beyond any reasonable doubt that the confession was voluntary. (See e.g. *Ibrahim v. the Emperor* [1914] 599 AC; *Wong Kam Ming v. the Queen* [1980] AC 247). In holding, as he did in fact hold, that "the accused must show that he was put in fear in order that the statement should result", the Judge had reversed the onus and disregarded the requirement that the prosecution must prove beyond any reasonable doubt that the confession was voluntary.

Secondly, it is also a fundamental principle of our Criminal Law, that in deciding whether or not a statement made by an accused person was obtained from him either by fear or prejudice or hope of advantage exercised or held out by a person in authority, the cardinal point, is not so much the state of mind of the police officer (in this case Giam) but that of the accused (in this case the appellant). In holding that the appellant "must show that he was put in that fear in order that the statement should result" and "that Hasi (the Appellant) was not in the sort of

fear the law requires to exclude his statement", the Judge excluded from his consideration, the state of mind of the appellant with all its foibles and fortitudes, which was most material and instead, confined his attention, to the intention of Inspector Giam.

So for example, in *R v. Richards* [1967] 51 Cr. App Rep 266, Winn LJ said, *inter alia* this (at pp. 268, 269):

> ... What ever be the nature of the inducement so made and however trivial it may seem to the average man to have been such an inducement will at least be capable of rendering the statement he made inadmissible; it will have that effect unless in a given case it becomes plain beyond a reasonable doubt that it did not operate at all upon the mind of the person to whom it was made ...

Similarly, in *R v. Northam* [1968] 52 Cr App Rep 97; the same learned Lord Justice said, *inter alia*, this (at p.104):

> ... It is not the magnitude, it is not the cogency to the reasonable man or to persons with such knowledge as is possessed by lawyers and others which is the proper criterion. It is what the average, normal, probably quite unreasonable person in the position of the (suspect) at the time might have thought was likely to result to his advantage ...
>
> The Court realises that this is imposing yet one more clog upon the efficient performance by the police of their duties ... but the Court does feel bound to say that here there was an inducement, within the meaning that that word has been given in a long series of decisions, capable of influencing the mind of this appellant, *albeit* he himself appears to have misunderstood the nature of the inducement which was being offered to him. In a sense he was self-induced by a mistaken view, but not a view which it is impossible that he could honestly have formed ...

Thirdly, turning to the facts, the Judge held that the refusal of the appellant to sign the paper upon which Giam had recorded the replies allegedly made by the appellant to Giam's questions, told against the appellant, as it went to show "that he was bold enough to sign". The Judge should have, but did not recognise, that such refusal was equally open to the inference that the alleged incriminating replies made by the appellant (assuming they had been made at all) might have been the result of inducement or threat. Especially is this so, since the Judge was considering a question of admissibility of alleged incriminating replies by an accused person, in handcuffs, to a police officer, who had arrested him, in the course of a raid, and given the circumstances outlined above, when the accused must have been in a distraught state and under severe anxiety and mental strain.

Had he directed himself in that way, he would inevitably have excluded the appellant's alleged incriminating replies, since it is elementary that where a proved or admitted fact is equally open to two inferences, that in favour of the accused should be adopted. But, the Judge did nothing of the sort, and in consequence he, in effect, gave the benefit of the doubt, on the point at issue to the prosecution.

On a further ground, also, the Judge ought to have excluded the appellant's alleged confession having regard to the oppressive circumstances under which it was made (assuming for one moment that it was made at all). There is high authority for the proposition that the "voluntariness" test has been expanded to include within its ambit statements which are rendered inadmissible by reason of the fact that they were obtained under oppressive circumstances. It is true that the provisions of proviso (a) to s.37A(1) of the Dangerous Drugs Act which repeat s. 24 of the Evidence Act, do not provide for this as a ground for excluding a confession by an accused person, but the authority to which we shall be referring in a moment, appears to have incorporated the Common Law.

In *Dato Mokhtar bin Hashim v. PP* [1983] 2 MLJ 232, a decision of the Federal Court, the Court found that the trial Judge was wrong in failing to exclude the statement made by the accused because it was the result of prolonged periods of questioning ranging into the small hours of the morning which "appeared to be suggestive of oppression." In so holding, the Court applied the definition of oppression propounded by Sach J. in *R v. Priestley* [1965] 51 Cr App Rep 1 as "something which tends to sap and has sapped that free will which must exist before a confession is voluntary", which was adopted in *R v. Prager* [1972] 1 WLR 260.

We also note that in *R v. Fulling* [1987] 2 AER 65, a Court of Appeal decision, Lord Lane CJ held that oppression must be given its ordinary dictionary meaning and applied the definition of that word as it appears in the Oxford Dictionary which says this:

> Exercise of authority or power in a burdensome, harsh or wrongful manner, unjust or cruel treatment of subjects, inferiors, etc.;

> the imposition of unreasonable or unjust burdens.

His Lordship went on to add that the Court "finds it hard to envisage any circumstances in which such oppression would not entail some impropriety on the part of the interrogator".

In the instant appeal, the Judge failed to recognise that psychological oppression can be more insidious than, and just as effective, as physical pressure on a suspect who in many cases will be incapable of evaluating its effect upon him and not sufficiently articulate to explain the circumstances and effect to the Court. In this context, the Judge should have, but did not recognise, that the technique adopted by Giam in questioning the appellant soon after he had been forced out of his bed where he had been sound asleep, during the early hours of the morning, and while handcuffed, **could** have implied some impropriety on the part of Giam, however slight. We hasten to add, however, that in all probability, Giam in his zeal to collect evidence, did not realise that his actions might later attract judicial criticism.

The Judge should therefore have concentrated on the methods adopted by Giam in questioning the appellant and the conditions under which that questioning was conducted rather than on whether the appellant was "put in fear in order that a statement would result".

Having decided that the alleged confession by the appellant was wrongly admitted, we had to consider the further question whether, on a fair consideration of the rest of the evidence, which was purely circumstantial, the improper admission of the alleged confession, had turned the scale against the appellant. We were satisfied that the improper admission of the alleged confession was gravely prejudicial to the appellant, did turn the scale against him and that, in consequence, a miscarriage of justice might well have occurred.

We would go further and say that without the evidence of the alleged confession, the case against the appellant was based upon suspicion and guesswork and got nowhere near to establishing the essential ingredients of the offence of which he was convicted, bearing in mind that the proverbial cap fitted not just the head of the appellant but that of the other accused persons Johan and Rahmat as well, who, it will be recalled, were also sleeping in the house at the time of the police raid. Certainly, the prosecution itself thought so for why else should they have charged all three of them? Moreover, there was no evidence of common intention on the part of the three accused persons to commit the offence charged.

Before departing from this case, we would pause to mention that there was also considerable argument before us regarding the admissibility of the chemist's report which had been admitted under s. 399 of the Criminal Procedure Code. The evidence disclosed that the defence had pursuant to the provisions of the proviso to subsection (iv) of s. 399, given the three clear days' notice in writing to the prosecution, before the commencement of the trial, stating that they required the attendance of the chemist for cross-examination but the prosecution had not ensured the attendance of the chemist and that therefore, the chemist's report was inadmissible in evidence.

The prosecution's reply was that the chemist had migrated to Australia, and that therefore his report was admissible under s. 32(b) of the Evidence Act, which provides as follows:

> 32. Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:
>
> (b) when the statement was made by any such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him.

The reply of the defence to this contention by the prosecution was that there was insufficient evidence before the Court, that the chemist had emigrated and that even if there had been evidence, there was insufficient evidence adduced by the prosecution to bring themselves within the exception to the hearsay rule embodied in s. 32(b).

Having regard to the conclusion at which we had arrived on the admissibility of the alleged confession by the appellant, and its effect on the case for the prosecution, it is unnecessary for us to decide these other questions. Moreover, were we to do so, our decision would be *obiter dicta*.

In the result, so far from being "a hopeless case" for the appellant, as the Judge thought, the case for the prosecution was weak and improbable in the extreme. Accordingly, we allowed the appeal, quashed the conviction, set aside the sentence of death and substituted an order of acquittal and discharge.

TENG BOON HOW

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
TAN SRI DATO' HARUN BIN MAHMUD HASHIM SCJ,
TAN SRI DATO' HAJI MOHD AZMI BIN DATO' HAJI KAMARUDDIN SCJ,
TAN SRI DATUK EDGAR JOSEPH JR. SCJ
[CRIMINAL APPEAL NO. 05-176-90]
20 SEPTEMBER 1993

EVIDENCE: Trial Judge subjecting accused and defence witnesses to severe cross-examination - Whether by doing so trial Judge had assumed role of prosecutor - Whether trial Judge had gone beyond the desirable limits of judicial intervention in cross-examining on matters not arising from the evidence adduced - Whether accused's conviction was the result of such cross-examination - Consideration of s. 165 Evidence Act 1950 - Accused's right of silence - Trial Judge making adverse comments on accused's failure to disclose his defence before trial - Whether trial Judge drew inference of guilt from accused's silence - Whether trial Judge had misdirected himself - Whether there was evidence justifying inferences drawn by the trial Judge.

This was an appeal against conviction and sentence of death for trafficking in 26.30 grammes of heroin, in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952. At the close of the case for the prosecution the trial Judge ruled that there was a case for the appellant to answer and the appellant was called to enter upon his defence. In the course of the defence evidence, the Judge himself subjected the appellant and the defence witnesses to severe cross-examination. The appellant was cross-examined upon re-call by the Court after he had given evidence and the other witnesses were cross-examined after examination in chief, cross-examination and re-examination by Counsel.

On appeal, the appellant contended that the Judge had assumed the role of prosecutor by cross-examining the appellant and the defence witnesses and that this cross-examination was not for the purpose of just clarifying testimony given but went much further, including within its range, matters not arising from the evidence adduced, and that the conviction was based mainly upon the results of such cross-examination.